

**GOOGLE LLC'S
ADMINISTRATIVE
MOTION
REQUESTING LEAVE
TO DEPRECATE**

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

CHASOM BROWN, *et al.*, individually and
on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

Case No. 4:20-cv-03664-YGR-SVK

**GOOGLE LLC'S ADMINISTRATIVE
MOTION REQUESTING LEAVE TO
DEPRECATE**

Judge: Hon. Susan van Keulen, USMJ

1 For the reasons below, Google respectfully seeks the Court's permission to deprecate an
2 obsolete field found in certain of its [REDACTED] logs. The parties have stipulated
3 Google may request the Court's permission to do so, and that Plaintiffs' deadline to respond to
4 Google's request is extended to January 4, 2023. 12/21/2022 Declaration of Andrew H. Schapiro ¶
5 2, Ex. 2.

6 While reviewing data recently compiled for, and produced in, the related *Calhoun* case,
7 counsel for Google became aware of a boolean log field named [REDACTED]. The values
8 for the [REDACTED] field are generated with [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED] 12/21/2022 Declaration of Borbála Katalin Benkő ¶ 3, 5. Use of these API
14 behaviors by websites to detect private browsing modes was public and well-documented in the
15 media, and Chrome publicly announced changes to the relevant API behavior to prevent Incognito
16 detection in 2019, nearly one year prior to Plaintiffs' filing suit.¹ Because the underlying heuristic
17 [REDACTED], the [REDACTED] field is defunct and does
18 not function for any of the browsers in Plaintiffs' class. Consistent with Google's ordinary code
19 maintenance and data minimization practices, Google seeks to deprecate the field and heuristic
20 entirely.
21

22 The [REDACTED] field and underlying heuristic affect no relevant issue in this case.
23 Further, while Google was investigating the heuristic, the Court denied Plaintiffs' motion to certify
24 a Rule 23(b)(3) damages class on grounds wholly unrelated to whether individual class members
25

26
27
28 ¹ Jul. 18, 2019 Google News Initiative, *Protecting Private Browsing in Chrome*, accessed at
[\(https://blog.google/outreach-initiatives/google-news-initiative/protecting-private-browsing-chrome/\)](https://blog.google/outreach-initiatives/google-news-initiative/protecting-private-browsing-chrome/).

1 (and their private browsing instances) could be identified. In the interest of transparency, however,
2 Google seeks the Court's permission to deprecate the [REDACTED] field and heuristic.² To
3 support the relief it seeks above, Google provides the following information from its investigation
4 to date. Google stands ready to provide any additional information if requested by the Court.

5 The [REDACTED] field was created by [REDACTED] as one of
6 hundreds of possible data elements used to [REDACTED]. *Id.* ¶¶ 3-4. The
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]. *Id.* ¶ 2.
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 The heuristic currently [REDACTED] *Id.* ¶ 6.
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] *Id.* ¶ 5 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED] *Id.*
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED] *Id.*
27 [REDACTED]

28 ² Google's request does not extend to the source code that operationalized the heuristic which Google is retaining and which can be made available for inspection should the need arise.

1 Exploitation of these APIs as a potential indicator of private browsing modes—often by
 2 publishers seeking to enforce paywalls—was well-documented in public reporting.³ It was also
 3 illustrated in documents produced in this case.⁴ Also publicly documented were the efforts by
 4 browser publishers to prevent this use case by modifying the APIs. For instance, Google publicly
 5 identified the relevant Chrome API in a blog post on July 18, 2019, and explained it would be closing
 6 the “loophole” used to detect Incognito with the release of its Chrome version 76 on July 30, 2019.⁵

7 The [REDACTED] did not re-configure the [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]. *Id.* ¶ 6. [REDACTED]
 11 [REDACTED]
 12 [REDACTED]. *Id.* Therefore, the [REDACTED] heuristic does not provide accurate values for any
 13 browser in Plaintiffs’ class because [REDACTED]
 14 [REDACTED]
 15 [REDACTED]

16 Google would like to deprecate the [REDACTED] field and heuristic from its logs, as
 17 it is the type of defunct code that would be deprecated in the ordinary course to maintain the integrity
 18 of Google’s logs. *Id.* ¶ 7. Google brings this issue to the Court’s attention in an abundance of caution
 19 given contentious discovery battles between the parties related to preservation and log discovery,
 20 and respectfully requests an order allowing Google to deprecate.

21 DATED: December 21, 2022

22 QUINN EMANUEL URQUHART &
 23 SULLIVAN, LLP

24 By /s/ Andrew H. Schapiro
 25

26 ³ See, e.g., July 20, 2019, *Wired*, accessed at (<https://www.wired.co.uk/article/google-chrome-incognito-mode-privacy>) (explaining “FileSystem API detection” and noting “Google has announced the next iteration of its web browser, Chrome 76, will close the loophole”).

27 ⁴ See, e.g., Schapiro Decl. Ex. 1 (GOOG-CABR-04331727) (Google internal document describing API “loopholes” and Chrome’s responses).
 28 ⁵ *Supra* n.1.

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